IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1040 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHAGWANBHAI BHAIJIBHAI SOLANKI & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR YATIN SONI for Appellant(s) : 1 - 2.
MR ND GOHIL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM N.MEHTA

Date : 05/09/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellants herein were the accused before the Sessions Court, Kheda at Nadiad in Sessions Case No.129 of 1998 which came to be decided on 30th June, 1998 by learned Additional Sessions Judge, Nadiad. The appellants came to be convicted for the offence punishable under Section 302 read with Section 34 of I.P.C. for murder of Dhulabhai Punjabhai Makwana allegedly committed by them on 24th February, 1998 at about 1800 hours in the outskirts of village Napavaanta. Appellant no.1 is alleged to have caused injury to the deceased on his head with a Daanti and appellant no.2 is alleged to have caused injury on the abdominal portion of the deceased by giving stick blow. The incident is allegedly witnessed by Baijiben Ambalal who happens to be the sister-in-law of the deceased. The F.I.R. is filed by one Kaabhaibhai Himatbhai Makwana, nephew of the deceased. On basis of the F.I.R., offence came to be registered and investigated. Chargesheet was filed in the court of J.M.F.C., Borsad who, in turn, committed the case to the Court of Sessions at Nadiad and Sessions Case No.129 of 1998 came to be registered. The appellants came to be tried and convicted of the charges levelled against them. The appellants are sentenced to undergo imprisonment for life and to pay fine of Rs.10,000/- each, in default, to undergo S.I. for a period of three years. Aggrieved by the said judgment and order, the present appeal is preferred by the original accused persons.

2. Learned advocate Mr. Yatin Soni appearing for the appellants has raised the following contentions.

2.1 Presence of Baijiben and Mohmmad Khan is doubtful because as per the original prosecution case,

only Baijiben had witnessed the incident but later on Mohmmad Khan also projected himself to be an eye-witness to the incident and has been examined as such. Both of them had no occasion to be at the place of incident and the prosecution has not produced any evidence to support their version or to show their presence at the place was possible.

2.1.1 Mr. Soni also contended that the evidence about the time of death of the deceased is unreliable. Whether the deceased succumbed to the injuries on the spot or whether he died at a later point of time and if so, at what point of time is not emerging from the prosecution evidence. There are conflicting pieces of evidence on this aspect.

2.1.2 It was contended that the incident allegedly occurred at about 1800 hours and if the calendar is seen, the sunset time was 1831 hours and, therefore, there would have been little visibility considering the fact that the incident occurred in the month of February. It is also contended that eye-witness Baijiben could have been at a distance of at least 200 metres which would make identification of the assailants difficult, if not impossible and barring evidence of Baijiben, there is no other direct evidence adduced by the prosecution. The Trial Court has also not believed evidence of Mohmmad Khan who claimed to be an eye-witness, but the Trial Court has drawn support from his evidence as a corroboration to the evidence of Baijiben which, according to Mr. Soni, is an error.

2.2 Mr. Soni contended that the evidence of the prosecution, therefore, is not reliable and sufficient to connect the appellants with the offence. However, by way

of alternative plea, he contended that no intention can be read on the part of the appellants to commit murder of the deceased. The case, therefore, would fall within the definition of culpable homicide not amounting to murder rather than murder. The case, therefore, would be punishable under Section 304, either Part I or Part II of I.P.C. He submitted that if the appellants had intention to cause murder of the deceased, the appellant no.1, who was armed with a Daanti, which is a more deadly weapon than a stick, would have given the blow with its blade rather than the back of the blade and the blow would have been given with greater force on a vital part which is not the case. The evidence in this regard is clear to show that injury caused by appellant no.1 with Daanti is not the fatal injury. The injury which is caused by appellant no.2 is with a stick and it is a matter of ill-luck on the part of the deceased as well as the appellant that the deceased died because of a blow which was given on chest. Except weal marks, there are no other external injuries. The liver may have ruptured because of a number of factors including alcoholism. Mr. Soni submitted that it has come in evidence that smell of liquor was emitting from the contents of stomach. The deceased was drunk at the relevant time and his liver may have ruptured even on a little force being used with stick. No inference regarding intention to cause death of the deceased, therefore, can be drawn. He, therefore, submitted that benefit of the case falling with the definition of culpable homicide not amounting to murder may be given to the appellants.

2.3 Mr. Soni relied on the following decisions in support of his submissions:

(1)AUGUSTINE SALDANHA vs. STATE OF KARNATAKA (AIR 2003 SC 3843),

(2)PATEL RASIKLAL BECHARBHAI AND OTHERS vs. STATE OF GUJARAT (AIR 1992 SC 1150) and

(3)CHACKO ALIAS ANIYAN KUNJU AND OTHERS vs. STATE OF KERALA (AIR 2004 SC 2688).

3. Learned APP Mr. Gohil has opposed this appeal. According to him, presence of Baijiben cannot be doubted. She hails from an agriculturist family. She was in the field at the relevant time and she was at a visible distance. For a villager, 200 metres is not such a distance which would make it difficult for the witness to identify the assailants. There is no evidence to show that eyesight of the witness was weak. Mr. Gohil also submitted that the incident has occurred at 1800 hours which is half-an-hour prior to sunset and there was sufficient light. He also submitted that the possibility of the deceased being an addict to liquor resulting into cirrhosis of liver stands ruled out by medical evidence. There is a specific medical evidence to show that liver of the deceased was normal. Necessary inference, therefore, is that the stick was wielded with such a force that the liver got ruptured resulting into the death of the deceased. Mr. Gohil submitted further that the decisions relied upon by learned advocate for the appellants turn on their own facts which are quite different from the facts of the present case and cannot help the appellants in any manner. Lastly, it was submitted that the trial commenced within four months of the incident and the memory of the witnesses would be fresh in their minds. Besides face, there are several other factors which are considered while identifying the person namely, his structure, his bearing, his gait etc. and, therefore, no doubt can be raised regarding identity

of the assailants.

3.1 Mr. Gohil submitted that both the accused persons have used their respective weapon. The blow given by appellant no.1 fell on the head of the deceased, though it is not a fatal blow, it was given on a vital part of the body and, therefore, it cannot be said that the appellants did not have intention to cause death of the deceased. The injury caused by appellant no.2 with the stick, which is the fatal injury, has been opined by the doctor to be sufficient in ordinary course of nature to cause death and, therefore, the case would fall within the definition of murder rather than culpable homicide not amounting to murder. The Trial Court has considered all relevant aspects and has given findings. The appeal may, therefore, be dismissed.

4. We have examined the record and proceedings from the light of the submissions made by rival sides.

5. Before we proceed to discuss the merits of the case, we may record that appellant no.1 has expired during the pendency of this appeal and his appeal would, therefore, stand abated. The appeal now requires to be decided keeping in light only appellant no.2.

7. Dr. Prashant Rasikbhai Patel is examined at Exh.7. He had performed the post-mortem. In his deposition, he has described the injuries found on occipital region of the head of the deceased and an injury on the right abdominal part of the body. According to him, the second injury found on abdominal part of the body had corresponding internal injuries in form of rupture of spleen and liver. According to the doctor, these injuries were sufficient in ordinary course

of nature to cause death. He has, in clear terms, stated that the liver was normal in size and was not enlarged. He also opined that the injury was possible with a severe blow of a stick. During cross-examination, he denies suggestion that injuries found on the dead body were possible to be caused in a vehicular accident. He also indicated that the deceased may have died within 5 to 7 minutes of sustaining injury. He also indicated that considering the F.S.L. report, it cannot be said that the deceased was drunk. The post-mortem notes are produced at Exh.8. It is clear from this medical evidence that the injuries sustained by the deceased were sufficient in ordinary course of nature to cause death, that the fatal injury was possible with a stick, that the condition of liver was normal and that the injuries were not possible in a vehicular accident. All these facts lead us to conclude that the death of the deceased was homicidal.

7. Now coming to the incident, as per the prosecution case, the incident was witnessed by Baijiben who is examined at Exh.11. She says that the deceased was his brother-in-law (younger brother of the husband). The incident took place about four months prior to her deposition in the court, at about 6.00 p.m. At that time, she had gone to pluck vegetables in the field of Ramanbhai Ranchhodbhai, known as Navliwala field. She says that at that time, she saw Bhagabhai Bhaijibhai and Gababhai Bhaijibhai near the house of Bhagabhai. Bhagabhai had Daanti and Gababhai had stick. She saw Bhagabhai giving a Daanti blow to Dhulabhai as a result of which Dhulabhai fell down and thereafter Gababhai inflicted stick blow on the chest of the deceased. The deceased had gone to collect money of sale of corn and while he was returning, he was assaulted upon by the accused persons. She says that she does not know the

cause for the assault. Seeing the incident, she went to call her sister-in-law. She told her sister-in-law that Dhulabhai is being beaten by Bhagabhai and Gababhai, therefore, her sister-in-law went there. The witness says that she learnt that Dhulabhai was not in a position to speak. Daanti blow was given on rear part of the head.

7.1 During cross-examination, she states that there were no persons in the field where she had gone to pluck the vegetables. She admitted that the place where the deceased was lying was on the road which goes from Dehmi to Dahod. She says that there is traffic on the road. After the road, there is the field of Bhagabhai and thereafter, after leaving the canal, there is the field of Gababhai next to which is the Navliwala field. She states that there are no other trees or obstructions in between and the place of the incident was straightaway visible from the place where she was working. She denies suggestion that she had a quarrel with the accused persons. During questions by the court, she stated that she was on the western end of the field and the road is on the eastern side. She states that there was a hedge to the field of Raman Ranchhod but it was very low lying. On being asked as to how many fields were there in between his field where she was standing and the field of Amarsinh Jeetsingh, she replied that there is none. She stated that she has not raised any shouts and because she was frightened. She did not make any attempt to rescue. She admits that she did not go to the place of incident immediately but she went there after Baluben reached there.

8. Witness Mohmmad Khan Himmatkhan Rana is examined at Exh.17. He was cited as a panch witness by the

prosecution in the chargesheet but it transpires from his deposition that he claimed to be an eye-witness to the incident and, therefore, questions in that regard were also put to him with permission of the court. He states in his deposition that on hearing the accused persons and the deceased quarreling, he came to the hedge of his field and saw that Bhagwanbhai gave Daanti blow on the neck of the deceased - Dhulabhai. As a result, Dhulabhai fell down. Therefore, they shook head of the deceased by catching the hair, the deceased got up again and thereafter, Gababhai gave a push in the chest of the deceased with the stick. Dhulabhai fell down on the road. The witness said that he stood there for a couple of minutes and then went away. According to him, the distance between the place where he was standing and the place where the incident occurred was about 200 feet. He has been cross-examined at length and during cross-examination, he states that he had told Kaabhaibhai Himmatbhai and Gordhanbhai Dhulabhai about having seen the incident. He denies suggestion that he had not seen the incident. He also denies suggestion that he had been having disputes with the accused persons, they being neighbours.

9. From depositions of these two witnesses, what transpires is that Baijiben from the beginning claims to be an eye-witness to the incident. It is Baijiben who went and informed the wife of the deceased about the incident.

9.1 Her deposition is challenged on the ground that she is a chance witness. However, the fact that she had gone to pluck vegetables in the Navliwala field has remained unchallenged. What is challenged in her claim is that she had seen the incident. There is no reason to

doubt her deposition. Female folk in villages work in fields is a fact which can be judicially accepted.

9.1.1 Her deposition is also challenged on the ground that she could not have clearly seen the incident because of distance and because of insufficient light. The distance is approximately 200 metres which cannot be considered too far for a person to be able to see an incident and identify known persons. It is not in dispute that the accused persons and the deceased were known to this witness. There is also no material even to infer that the eyesight of the witness was weak. It has also come in evidence that there was no obstruction in between the place where the witness was standing and the place of incident and, therefore, it is not possible to accept that she could not have seen or identified the assailants from a distance of 200 metres.

9.1.2 So far as the contention regarding insufficient light is concerned, it is raised for the first time before us. During the trial, that contention has not been raised. No questions are put to the witness in this regard. Learned advocate Mr. Soni took pains to find out the sunset time which was, according to him, 1831 hours. The incident occurred at 1800 hours i.e. about half-an- hour prior to sunset. The contention that the light would be insufficient, therefore, cannot be accepted because even after the sunset, there would be light. There is a transition period known as twilight and dusk before night sets in. Under the circumstances, the contention that the light may have been insufficient for the witness to see the incident also cannot be accepted.

9.2 Deposition of Baijiben cannot be discarded on

the ground that her conduct is unnatural when she does not raise shouts or does not try to rescue the deceased. The conduct of a person would vary from individual to individual depending on individual character. A person may get dumbstruck, there may be a person who may try to rescue, there may still be a person who would run away and there may still be a person who would even intervene and assault the assailant and, therefor, only on the ground of conduct, it is not possible to doubt the deposition of Baijiben.

9.3 The deposition of Baijiben cannot be doubted on the ground of she being a relative of the deceased. She has no reason to falsely implicate the accused and let go the real assailants. She is honest enough to say that she does not know the cause for the assault. She does not claim to have heard anything when the incident occurred and rightly so, because she may not have heard what transpired between the accused persons and the deceased from a distance of about 200 metres. Her version gets corroboration from medical evidence as to how the incident occurred and what type of injury was caused by whom. In our opinion, therefore, the Trial Court was justified in accepting her deposition.

10. So far as deposition of Mohmmad Khan Himatkhan Rana is concerned, his deposition as regards the incident does not inspire much confidence because though he claims to have told Kaabhaibhai and Gordhanbhai of having seen the incident even prior to Kaabhaibhai lodging the F.I.R., Kaabhaibhai does not say in his F.I.R. that the incident was seen by Mohmmad Khan. Not only that, his statement is not recorded by the police in this regard. He claims to be present when the Investigating Officer recorded statements of other witnesses. He could have

very well told the Investigating Officer that he has also seen the incident but that has not happened and he is cited only as a panch witness. In our opinion, not much credit can be given to deposition of Mohmmad Khan Rana (Exh.17) as an eye-witness.

11. We have also examined depositions of Kaabhaibhai – the 1st informant, Baluben Dhulabhai, Gordhanbhai Dhulabhai besides the deposition of the Investigating Officer. Nothing turns in favour of the accused from depositions of these witnesses. They all support the prosecution case. They have narrated the sequence of events in a natural way.

12. However, it may be worth a note that there is inconsistency as regards the actual time of death of the deceased. The medical evidence says that the deceased could have died within 5 to 7 minutes after sustaining injuries. There is evidence to show that the deceased was alive till next morning. There is also evidence to show that the deceased was not speaking from the very beginning. The necessary inference is that the deceased was either dead or unconscious and rustic villagers, as they are, may have committed some mistake in realising as to when the man died factually. In light of deposition of Baijiben, which is found to be quite reliable, exact time of death becomes insignificant.

13. Now, therefore, what we have is evidence which connects the appellant with the incident and, therefore, this court would be required now to examine whether the case would fall under the category of culpable homicide not amounting to murder as contended by learned advocate Mr. Soni.

14. There is no evidence worth a name which would go to show that the case of the appellant would fall under any of the exceptions to Section 300 or general exception. Appellant no.2 is alleged to have caused fatal injury. The injury is caused with a stick. The blow is given on abdominal portion which has resulted into tear of spleen and rupture of liver. The liver is found to be normal. There are no indications of any disorder in the liver or spleen. The necessary inference is that the blow which was given by appellant no.2 to the deceased on abdominal portion with the stick was given with such a force that even with the flexibility of the abdominal area, it has resulted into fatal injuries to the liver and the spleen which resulted into death of the deceased. The injury is caused to the deceased after he fell down on the floor as a result of Daanti blow by the appellant no.1. Merely because single blow is given, it cannot be inferred that there was no intention. For knowing intention of a person, various factors are required to be kept in mind like the nature of weapon used, the site of injury, number of injuries, the nature of injuries caused and the force with which the injury is caused. Here in the instant case, though only one blow is given, it is given with such a force that two important organs of the body were ruptured to an extent that the man would have died within 5 to 7 minutes. The fatal blow was given by appellant no.2 after the deceased fell down on receiving injury on head caused by appellant no.1 with Daanti. These factors are sufficient to bring the case of the appellant within the definition of murder.

15. Learned advocate Mr. Soni relied on the decision in the case of **AUGUSTINE SALDANHA vs. STATE OF KARNATAKA reported in AIR 2003 SC 3843**. In that case, benefit of

Section 304 Part II was given to the accused considering various aspects like giving of single blow with stick, the incident occurring in pitch dark night time in forest, there was no evidence to show that the accused chose vital part of the body to inflict injury, that the blow was aimed without any of such specific intention, could have landed on the head due to so many circumstances, than due to any positive intention. However, in the instant case on our hand, except single blow being given by stick, there are no other circumstance to attract Section 304.

15.1 Learned advocate Mr. Soni also relied on the decision in the case of **PATEL RASIKLAL BECHARBHAI AND OTHERS vs. STATE OF GUJARAT reported in AIR 1992 SC 1150**. In that case, the conviction of the accused came to be altered from murder to culpable homicide not amounting to murder considering that there was a quarrel, that the deceased rebuked the accused which infuriated him and the accused gave a single blow of agricultural implement which he was carrying. The blow fell on the neck of the deceased but it was observed that it cannot be said that the accused intended to cause the neck injury and under those circumstances, the conviction was altered. In the case on hand, the evidence is otherwise and the decision will be of no help to the appellant.

15.2 The third decision relied upon by learned advocate for the appellant was in the case of **CHACKO ALIAS ANIYAN KUNJU AND OTHERS vs. STATE OF KERALA reported in AIR 2004 SC 2688** where also the conviction was altered from Section 302 to Section 304 Part I considering that all injuries were inflicted on non-vital parts except one injury on the head, the weapons used were short handles of axe and spade and that the incident

occurred in darkness. In the case on hand, the situation is otherwise and, therefore, the decision cannot be of any help to the appellant.

16. The last but not the least, it has been contended that intention cannot be inferred on the ground that the deceased appellant no.1 is alleged to have inflicted Daanti blow on the head of the deceased and the doctor has opined that external injury no.1 on the head of the deceased is not possible with a sharp-edged weapon and appellant no.2 has caused injury with a stick and they could not have shared common intention of causing murder of the deceased. It is not possible to accept this contention for the reason that though the doctor has said that injury no.1 is not possible to be caused with a sharp-edged weapon, it has come in evidence that the injury was caused with the hind portion of Daanti which is not sharp-edged. Appellant no.2 has caused injury with stick which is proved to be fatal and as discussed above, the force with which the injury is caused leads us to conclude that there could not have been other intention than to cause death of the deceased.

17. In light of the above discussion, we are of the view that the conviction recorded by the Trial Court was justified and no interference is called for. The appeal of appellant no.2 stands dismissed. Appeal in respect of appellant no.1 stands abated. The judgment and order dated 30th June, 1998 rendered by the learned Additional Sessions Judge, Nadiad in Sessions Case No.129 of 1998 stands confirmed.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

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